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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. LARRY BUFFINGTON, Defendant and Appellant.	C051988 (Super. Ct. No. CR56225)

APPEAL from a judgment of the Superior Court of Sacramento County, Cheryl Meegan, Judge. Affirmed.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Julie A. Hokans, Supervising Deputy Attorney General, Sarah J. Farhat, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110 this opinion is certified for publication with the exception of parts I and II of the Discussion.

A defendant is committed to the custody of the state Department of Mental Health under the Sexually Violent Predator Act (SVPA) if a jury finds beyond a reasonable doubt that the defendant has been "convicted of a sexually violent offense against one or more victims" and "has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (Welf. & Inst. Code,[1] §§ 6600, subd. (a)(1), 6604.)

Here, to raise a reasonable doubt that defendant Larry Buffington was a sexually violent predator (SVP), the defense called psychologist Theodore Donaldson to testify that in his opinion defendant was able to control his sexually dangerous behavior. To show the psychologist's bias or prejudice, the People cross-examined him about the facts of three other SVPA cases in which he had testified and his opinion that those defendants were not SVP's.

In the published part of this opinion, we hold that the facts of the three other SVPA cases and the psychologist's opinion in those cases were not relevant to show his bias or prejudice, but we reject defendant's argument that the error in admitting the evidence was prejudicial.

In the unpublished part of the opinion, we reject defendant's three other arguments alleging insufficient evidence

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

to support the recommitment, evidentiary error, and instructional error.

We therefore affirm the judgment recommitting defendant to the custody of the state Department of Mental Health for an additional two years under the SVPA.

FACTUAL AND PROCEDURAL BACKGROUND

A

The Prosecution

Dr. Dawn Starr and Dr. John Hupka, two psychologists who conduct SVPA evaluations for the state Department of Mental Health, and Dr. Gabrielle Paladino, defendant's former treating psychiatrist at Atascadero State Hospital (Atascadero), interviewed defendant and reviewed his files. Based on the interviews and defendant's history, all three concluded defendant met the statutory definition of an SVP.

Defendant's history encompassed the details of his prior sexual offenses, his behavior in prison, and his behavior at Atascadero. Defendant's criminal history included a violent crime spree from September 1978 to May 1979. On September 1, 1978, defendant entered the home of a 14-year-old girl while she was sleeping, forced her into the backyard, told her he wanted to "lay her," and threatened her with death if she screamed. The girl's father interrupted the attack, and defendant fled. Two months later, on October 28, 1978, defendant entered the house of a 69-year-old woman in the middle of the night while her granddaughter was in bed with her, demanded money from the woman, and raped her at knifepoint. Three months later, on January 30, 1979, defendant

choked a 16-year-old girl who had been sleeping and then raped her while her 13-year-old sister was in the house. Three weeks later, on February 17, 1979, defendant raped a 23-year-old woman at knifepoint while her baby was in bed with her and threatened to kill them both if the woman told anyone about the attack. Three weeks later, on March 9, 1979, defendant raped a 39-year-old woman while her children were in the next room, put her in a closet, and then left. Two weeks later, on March 22, 1979, defendant raped a 54-year-old woman at knifepoint in her home, became angry when he was "not able to initially reach a climax," threatened to shoot her with a gun, forced her to orally copulate him, and threatened to sodomize her and place the knife in her vagina if she did not cooperate. Eight days later, defendant raped a 38-year-old woman while her children were in the house and made one of the children take off her clothes and lie on the floor. Less than two weeks later, on April 9, 1979, defendant entered the home of a 29-year-old woman, demanded money, and told her he had a knife and "want[ed] her." He fled after the woman's son woke up and the victim ran out of the house. At this point, defendant was arrested and held until May 2, 1979, when he was released after posting bail.

Approximately two weeks after being released, defendant raped a 23-year-old woman at knifepoint in her house after he had demanded money from her. Seven days later, on May 26, 1979, he threatened a 44-year-old woman at knifepoint in her house, told her he had "killed four people already so [she] better do what [he] sa[id]," and repeatedly tried to have intercourse with

her. Two days later he entered the home of a 54-year-old woman, hit her on the head, told her to "play with his penis so he c[ould] obtain an erection," raped her, demanded money from her, put her in a closet, and threatened to kill her if she came out. Defendant was arrested for his crimes on June 7, 1979, when he was approximately 19 years old. He was incarcerated for approximately 27 years.

While in prison in 1987, defendant masturbated in front of a female staff member and threatened to kill another female staff member.

In 1991, he was moved to Atascadero because he complained about "problems with his mood and paranoia and hallucinations." He later admitted he feigned those symptoms to get transferred to Atascadero where the living situation for inmates was much easier. While at Atascadero, he "implied" to a social worker he had committed more rapes than those for which he was "caught." During the 11 months defendant was at Atascadero, "he had repeated problems with female staff where he was hostile and enraged with them."

When defendant was returned to prison in 1992, he reported "hearing voices telling him to hurt females." In April 1994 and again in June 1994, he masturbated in front of a female correctional officer. After the first episode he was given a warning. After the second episode he was given a "serious disciplinary write up."

In May 1996, defendant was evaluated under the SVPA. He told the evaluating doctors "that something uncontrollable led

him to sexually offend," he "couldn't stop," and believed if he had not been caught, he would have eventually killed someone.

Defendant was committed to Atascadero as an SVP in February 1997, and within three months he was seen sitting naked on his bed and heard making "abusive" comments to female staff. He made several more inappropriate comments to or about female staff from 1998 to 2003.

Defendant was involved in physical altercations with other inmates at Atascadero in March 1998 and May 2003. In the 1998 incident, defendant punched an inmate in the bathroom because he had not served defendant "seconds" in the food line fast enough. The victim needed 12 stitches to his face. In the 2003 incident, defendant punched another inmate because he spit on defendant. The victim was knocked unconscious and fractured his skull.

While at Atascadero, defendant began a five-step sex offender treatment program. He participated only in phase one -- the "informational" part of the program. He attended substance abuse treatment "off and on" and appeared "generally committed . . . to being free from drugs and alcohol."

Since the end of 2003, defendant had not made any derogatory remarks toward female staff, had not crossed "boundaries," and had not been involved in any physical altercations.

Based on the foregoing review of defendant's history, Dr. Starr gave defendant a score of seven on the Static-99 test, which was in the high range of risk. Dr. Hupka and Dr. Paladino

gave defendant a score of five, which was in the medium to high range of risk. They also diagnosed defendant with paraphilia not otherwise specified, antisocial personality disorder, bipolar disorder, and substance abuse.

Paraphilia consists of recurrent and intense sexually arousing fantasies or urges. It is not something that can be cured, but it can be controlled. Dr. Starr believed defendant suffered from paraphilia because he had victimized multiple women over an 11-month period with the time period between the offenses narrowing, he had a girlfriend when he committed the assaults, he appreciated the serious consequences of his crimes because he threatened many of his victims if they reported the crimes, and he had a strong drive to rape as he continued his crime spree even when released on bail in 1979.

Antisocial personality disorder is an "enduring pattern of inner experience that deviates markedly from the person's individual culture and []tends to have an early onset." Those with the disorder have a greater risk of reoffending.

Bipolar disorder is characterized by mania, depression, and mood instability, often with periods of stability in between the episodes. Dr. Starr believed defendant was in clinical remission, but she "need[ed] to see a longer period of stability" before she could say he no longer had the disorder. She believed that since 2004 defendant had "demonstrated that he can control himself."

In addition to the testimony of these expert witnesses, the People called defendant to testify. On the stand defendant admitted he had previously lied under oath and to the examiners

"for personal gain." His motive in committing the sex offenses was robbery and "[i]t just led into" rape. He could not recall the details of the offenses because he was under the influence of drugs or alcohol when he committed them, but not a day went by that he did not think about "the ugly things" he had done. He was motivated not to commit another felony because he would spend the rest of his life in prison if convicted. He did not have a mental illness and was not at risk to reoffend. He did not continue with the second phase of the sex offender treatment program because of the "label" "among other reasons."

B

The Defense

Dr. Theodore Donaldson, a licensed clinical psychologist, evaluated defendant in March 2001 and updated his evaluation in November 2005. Defendant was very angry in his first interview but had "mellow[ed]" and become "reasonable, rational, polite, [and] informative" by his 2005 interview. Dr. Donaldson did not diagnose defendant with paraphilia because such a diagnosis was "[v]ery, very controversial" for "rape behaviors." In Dr. Donaldson's opinion, defendant had been able to control his sexually dangerous behavior at Atascadero because although he had "act[ed] out," he had not sexually assaulted anyone.

Dr. Christopher Herd, a licensed forensic and criminal psychologist, interviewed defendant in November 2005. In Dr. Herd's opinion, "[t]here was sufficient evidence to conclude there was not a diagnosable mental disorder." Defendant was "externally driven" or "opportunistic" rather than "internally

driven by some sort of abhorrent psychological process." Defendant currently was "well able to modulate his behavior and his responses" although he had not been able to do so in the past. Defendant's improved behavior was partly due to his participation in Alcoholics Anonymous (AA) and Narcotics Anonymous (NA), which were available to him "anywhere around the world at virtually anytime."

In addition to AA and NA, defendant participated in the thinking skills program at Atascadero, which is a "cognitive behavioral relapse prevention program" run by a Catholic chaplain. He also participated in the violence abatement committee, which included talking with patients after a staff member at Atascadero was brutally beaten.

If released, defendant planned to live with his fiancé whom he had met "over the phone" approximately one year ago. She had no concerns about defendant staying with her. She had "developed some understanding of the availability of [AA and NA] around where [she] live[d]" and was "okay" with defendant attending those meetings.

DISCUSSION

I

There Was Substantial Evidence Defendant Lacked The Present Ability To Control His Sexually Violent Behavior Unless Confined Within A Secure Facility

Defendant contends there was insufficient evidence he was an SVP because the People failed to prove he "lacked the present ability to control his behavior" and he could not control his

diagnosed mental disorder by voluntary outpatient treatment. We are not persuaded.

The federal Constitution prohibits the civil commitment of a recidivist sexual offender unless he lacks control of his sexually violent behavior. (*Kansas v. Crane* (2002) 534 U.S. 407, 412-413 [151 L.Ed.2d 856, 862-863].) Consistent with this constitutional requirement, the SVPA clearly requires the trier of fact to find that an SVP "'currently' suffers from a diagnosed mental disorder which prevents him from controlling sexually violent behavior, and which 'makes' him dangerous and 'likely' to reoffend. ([Welf. & Inst. Code,] § 6600, subd. (a).)" (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1162.)

Defendant's argument is focused on his participation in AA and the thinking skills program, his commitment to continue with voluntary treatment if released, the failure of the People's experts to take into account "the volitional prong of the civil commitment standard," and evidence that showed he "had controlled his behavior for the past two years."

Notwithstanding the evidence defendant has chosen to identify on appeal, there was substantial evidence from which the jury could find defendant lacked the present ability to control his sexually violent behavior unless confined in a secure facility. (See *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573 [before the judgment can be set aside for insufficiency of evidence, it must clearly appear that under no hypothesis is there sufficient evidence to support the verdict].)

Here, defendant admitted he had lied under oath and to examiners "for personal gain." These lies included stating he was the victim of physical and sexual abuse when young, he had contemplated suicide, and he heard "voices." He lied about the allegations of abuse to explain his anger and his "acting out." He lied about the auditory hallucinations to convince doctors not to place him in a level 4 penal institution. He continued lying to Dr. Starr on a number of occasions and in his interviews with Dr. Paladino and Dr. Hupka in 2004 and 2005.

His lies continued in his trial testimony where he could not keep his story straight. On one hand he testified he could not recall the details of his sex offenses because he was under the influence of drugs or alcohol when he committed them. On the other hand he testified that not a day went by that he did not think about "the ugly things" he had done, and he could "remember plain as day what I did and didn't do, because it haunts me every day I've lived with it." As the People argued in closing, "the inference to be drawn from his lies is that he is still not insightful enough or informed enough to be not at risk in this case" and that he is not "truly a changed individual." From this evidence, the jury reasonably could have concluded defendant did not have a present ability to control his sexually violent behavior, but rather, he had the present ability to feign behavior that suited the situation as he had in the past to get the results he wanted.

Moreover, despite defendant's claim that "any danger his diagnosed disorders presented to the community could be controlled

by his voluntary treatment through continued participation in programs like A.A.," a jury reasonably could have viewed his participation in such programs as anything but meaningful.

On one hand defendant testified that one of the steps he was working on in AA was "making a fearless and moral inventory of [him]self." On the other hand, when asked by the People at trial about his prior offenses he responded that they were "digging up old bones again" and "trying to beat [him] down with it," and he was "not comfortable . . . at all" looking back on the details of his sexual offenses. Given this testimony, the jury reasonably could conclude that defendant's claim he was amenable to outpatient treatment rang hollow.

II

The Court Did Not Err In Admitting Evidence Of Defendant's Masturbation In Prison

Defendant contends the trial court erred in admitting evidence that he violated prison rules by masturbating in view of correctional officers in 1987 and 1994. He argues the evidence was irrelevant, any probative value was substantially outweighed by the probability of undue prejudice, and the age of the evidence rendered its admission fundamentally unfair. We disagree.

A

The Evidence Of Defendant's Masturbation

Defendant's prior acts of masturbation were introduced in two forms: (1) through the testimony of the People's expert witnesses as a basis for their opinions; and (2) through the testimony of

correctional officer Pandora Headley who witnessed the masturbation incidents in 1994 and were admitted for the truth of the matter.

With respect to the first purpose the evidence was introduced, the People's experts testified that in July 1987, defendant masturbated in front of Correctional Officer White and stated, "'You want to see someone play with their prick, come back here and I'll show you how it's done, you bitch.'"

With respect to the second purpose for which the evidence was introduced, Pandora Headley testified that in 1994, she was a correctional officer at the California Medical Facility in Vacaville. At 1:30 a.m. on April 4, she was conducting her regularly-scheduled security checks of the inmates' cells. When she passed by defendant's cell, defendant was masturbating. She "wr[o]te him up for what is known as a 128 chrono," which counseled defendant about masturbating in front of her.

Approximately two months later, at 1:28 a.m. on June 27, Headley again was conducting her regularly-scheduled security checks. When she looked into defendant's cell, she saw defendant masturbating. The television in his cell was on and shining light onto his body, and the sound was turned off. There was nothing obscuring her view of his groin area. Upon seeing Headley, defendant did not stop masturbating and did not try to cover up. They did not talk at that time but when she was serving defendant food later that morning, she told him that she was writing him up for a "CDC 115" rules violation. Defendant became very angry and told her that his wife was really good looking and he would not have anything to do with an "ugly bitch" like Headley. Following

this incident, defendant filed a "602 appeal" against Headley alleging she was "over[ly]-familiar with [him]" and "sexually harassing him."

At trial, defendant denied masturbating in front of Headley and testified he had never in his life called any woman a bitch. He also denied masturbating in front of White and making the comments White attributed to him.

B

The Evidence Of Defendant's Masturbation Was Admissible

Evidence that is otherwise inadmissible can be admitted to establish the basis for an expert's opinion. (See Evid. Code, §§ 801, subd. (b), 802.) To the extent defendant's acts of masturbation in prison were offered in the form of hearsay evidence from the records of the "CDC 115" proceedings through expert testimony, the evidence was admissible as the basis for the experts' opinions.[2] To this end, the People's experts diagnosed defendant with paraphilia and testified their diagnoses were based in part on defendant's repeated masturbation in view of correctional officers. As Dr. Starr explained, "even while he was in custody and he knows he can be detected and have serious consequences, we have at least four documented incidents where he

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[2] As the trial court correctly noted, this evidence was a reliable source of information on which the experts could base their opinions. Defendant's argument to the contrary is based on what he views as deficiencies in Headley's testimony, namely her failure to remember the masturbation episodes at trial. Headley's trial testimony did not form the basis for the experts' opinions.

is seen showing his penis or masturbating in front of people, three times in corrections and once at Atascadero."

Moreover, contrary to defendant's position, the opinion of the People's expert witnesses on defendant's intent during the masturbation episodes was not inadmissible because that opinion was not admitted for the truth of the matter but, rather, to explain how they arrived at the Static-99 score. As Dr. Starr explained, the June 1994 masturbation episode qualified as the index offense (the most recent chargeable sex offense) under the Static-99[3] because based on the information available to her about the June 1994 episode, defendant could have been charged for exposing himself.[4]

The evidence of the 1994 incident with Headley was admissible for the truth of the matter so the jury could determine (even without expert testimony) whether defendant was an SVP. This

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[3] Dr. Hupka and Dr. Paladino confirmed that the June 1994 masturbation episode could be used as the index offense, but they chose to be more conservative in their assessment and did not count that episode as the index offense, leading to a lower score on the Static-99.

[4] Defendant argues the masturbation episodes could not have been used to assess the likelihood he would reoffend in a sexually violent manner because they were not among the predicate offenses enumerated in the SVPA. (Welf. & Inst. Code, § 6600, subd. (a)(2).) Defendant's argument is misplaced because there is no requirement the index offense in the Static-99 be a sexually violent offense. As Dr. Starr explained, "if somebody's in corrections and behaves in a sexual manner in a way that results in a serious rules violation or sanction and that would be [a] chargeable offense, that would constitute the index offense, in other words, whatever is the most recent sexual misconduct the person has had."

evidence was relevant because it showed that defendant, even within the confines of prison, engaged in sexually inappropriate and arguably criminal behavior, had not learned from his prior episodes of sexual misconduct, was lying about his past sexual misconduct, and thus, had a tendency in reason to prove he remained "a danger to the health and safety of others in that it is likely that he . . . will engage in sexually violent criminal behavior. (Welf. & Inst. Code, § 6600, subd. (a)(1).)

Defendant argues that even if probative, the court erred in admitting the evidence because of its prejudicial effect, noting the age of the masturbation episodes. He argues the evidence "was inflammatory because it unfairly suggested to the jury that [he] was at risk of behaving in the present as he had behaved nineteen and twelve years ago when his current behavior did not support such an inference." Defendant's argument overlooks that a jury could reasonably find from the evidence of the masturbation episodes and defendant's testimony, in which he denied the episodes had taken place, that defendant in fact had not changed. In this sense, the age of the prior acts did not mandate their exclusion, but rather, bore on their relevance as defendant was still contending the acts had not taken place even years after their alleged occurrence. There was no error, constitutional or otherwise,[5] in admitting this evidence.

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[5] Defendant's constitutional argument is based on his contention the admission of the masturbation episodes was "fundamentally unfair under the federal due process clause because so much time had elapsed that [he] could not fairly

III

The Error In Admitting Evidence Of

Other SVPA Cases Was Not Prejudicial

Defendant contends the trial court prejudicially erred in allowing the People to cross-examine Dr. Donaldson about his opinion in three other SVPA cases that those defendants did not qualify as SVP's. This testimony included the facts of the other SVPA cases. The court admitted this evidence finding it "ha[d] some relevance." We agree with defendant the evidence was not relevant for the People's stated purpose but disagree that its admission was prejudicial.

We begin our discussion with the testimony of the three other SVPA cases about which Dr. Donaldson gave his opinion, then explain why the evidence was not relevant to show his bias or prejudice, and conclude with why the admission of the evidence was not prejudicial.

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litigate it." Although it is true Headley testified she did not have "an independent recollection" of the masturbation episodes and based much of her testimony on her written report, defendant was able to fairly litigate the issue of the prior acts. His attorney cross-examined Headley on the purported facts of the episodes and elicited her failure of recollection. Moreover, defendant testified that the episodes involving Headley and White had never taken place, he had never in his life called a woman a bitch, and he did not make the comments attributed to him. The suggestion by defense counsel during argument to the trial court that trying to locate inmates and others potential witnesses (presumably to corroborate defendant's testimony) put the defense at a "very strong disadvantage" was speculation.

A

Testimony Regarding The Other SVPA Cases

In 2001, Dr. Donaldson "wrote an opinion" in the James Burris case. In July 1981, Burris knocked on the door of a woman who was home with her 16-month-old daughter and raped the woman using a screwdriver. In August 1981, he knocked on the door of another woman and tried to rape her using a screwdriver, but her husband interrupted the assault, and Burris fled. Burris was convicted of the first rape, and while he was out on bail pending sentencing, he attacked a woman in a parking lot with a knife, took her to a nearby location, and raped her. He was sent to prison, released in 1991, reincarcerated based on a parole violation, and rereleased in 1993. In November 1993, he lured a seven-year-old girl into his house and raped her. In Dr. Donaldson's opinion, Burris did not have a diagnosed mental disorder.

In 2002, Dr. Donaldson testified in the Carl Johnson case. Johnson had molested an 11-year-old boy in 1966 and spent time in an Indiana mental hospital as a "criminal sexual psychopath." When he was released, Johnson went to Tennessee where he orally copulated a 12-year-old boy, attempted to sodomize another 12-year-old boy, abducted another minor boy and sodomized him in a church basement, and then sodomized a fourth boy. For these crimes Johnson was sentenced to five years in prison. When Johnson was released in 1974, he went to California. Three years later he was convicted of sodomizing and orally copulating a 16-year-old boy who had physical disabilities. He served 10 years in prison. In 1992 Johnson was "committed" for sodomizing and orally copulating a 15-

year-old boy. In Dr. Donaldson's opinion, Johnson was able to control his sexually dangerous behavior.

In 2004, Dr. Donaldson testified in the Bradley Miller case. Miller admitted to molesting 20 to 25 boys from 1971 to 1991. In Dr. Donaldson's opinion, "there was insufficient evidence for a diagnosis of pedophilia" because the evidence indicated criminal behavior not a mental disorder.

As Dr. Donaldson explained on redirect examination, no amount of criminal activity creates a mental disorder. For a condition to qualify as a mental disorder under the Diagnostic and Statistical Manual of Mental Disorders (DSM), it must be due to dysfunction within the individual. Conflicts between the individual and society, including sexual ones, are not disorders unless they are due to this dysfunction.

B

The Evidence Regarding The Other SVPA Cases Was Not Relevant To Show Dr. Donaldson's Bias Or Prejudice

The People contend the evidence of the other SVPA cases was relevant to show Dr. Donaldson's bias or prejudice for impeachment. In their view, "[s]uch an attack on Dr. Donaldson's credibility was relevant to the weight of his testimony in the present case that [defendant] did not suffer from a diagnosed mental disorder." We disagree.

We begin with the evidence that was admissible to show Dr. Donaldson's bias and then contrast that evidence with the evidence at issue here and explain why it was not relevant.

At trial, the People elicited without objection evidence that Dr. Donaldson is a well-paid expert witness who routinely has reached conclusions favorable to the defense. For example, Dr. Donaldson admitted during cross-examination that only 24 of the 254 offenders he evaluated met the SVPA criteria, he disagreed 90 percent of the time with the state's experts about which offenders met the SVPA criteria, he earned approximately $180,000 in one year from doing SVPA cases, and he and defense counsel are good friends.

This evidence was relevant because a rational inference can be drawn that the more defendants for whom Dr. Donaldson testifies, the more he is not giving his true opinion in these cases, or that his analysis is not as trustworthy as it might be. As a matter of common sense, the fact that a well-paid expert witness routinely offers opinions in favor of SVP defendants in a great number of cases has some tendency in reason to prove he is not being entirely objective in formulating his opinion.

With this understanding of relevance in mind, we turn to what happened here. After the People elicited the unobjectionable testimony we have just described, Dr. Donaldson was asked about the facts of three SVPA cases in particular and his opinion in those cases. Had he been asked just about whether he had testified three times before in favor of SVP defendants, that would not have been nearly as relevant to show bias as much so as dozens and dozens. At some point, the sheer number begins to suggest bias, where a few instances would not.

Eliciting Dr. Donaldson's opinion about those three cases only had a tendency in reason to suggest bias if the jury had some other basis for concluding that the given facts reasonably should have led to a different opinion. If the state had put on an expert witness who offered an opinion that under the bare bones facts described, regardless of anything else, it would not be reasonable to find the absence of a mental disorder, then it might have been permissible to elicit testimony that Dr. Donaldson reached the opposite conclusion under those facts. That would go, not so much to show bias, but to undercut the value of Dr. Donaldson's opinion in this case. In other words, if the jury credited the testimony of the People's expert witness, then it could reasonably discredit Dr. Donaldson's contrary conclusion in the earlier cases, and by extension in this case. (If his opinion was not reliable three times before, why should the jury believe it is now?)

Without such contrary expert testimony, however, the only thing the jury had to rely on in questioning Dr. Donaldson's opinion in the three other SVPA cases was its own lay instinct that someone who commits those acts must have a mental disorder. But to be an SVP, a person must have a diagnosed mental disorder (§ 6600, subd. (a)(1)), and a lay jury had no basis for offering a medical diagnosis. Thus, even if the jury's gut lay instinct told the jury that someone who acts in a certain way must be mentally disturbed, and anyone who concludes otherwise is wrong and his opinions unreliable, that would not be a reasonable basis for rejecting the psychologist's testimony.

To be relevant, evidence must have a tendency in reason to prove or disprove a fact in dispute. (Evid. Code, § 210.) Here, the fact in dispute could be deemed the reliability of the psychologist's opinion. That Dr. Donaldson, in three previous cases involving men who committed multiple sex offenses, found no mental disorder did not have a tendency in reason to prove his opinion in this case was unreliable unless the jury had some basis in reason to reject the reliability of the psychologist's opinion in those cases. In this case there was no basis in reason for that inference. Nor could the jury rely on common sense, because common sense cannot tell the jury whether someone has a diagnosed mental disorder. As the SVPA makes clear, that is a matter for those qualified to make diagnoses. (§ 6601, subd. (d).)

For these reasons, the evidence of the three other SVPA cases in which Dr. Donaldson gave his expert opinion was not relevant to show his bias or prejudice. The court therefore erred in admitting the evidence.

C

The Error Was Not Prejudicial

Defendant contends the admission of evidence relating to other SVPA cases "undermined the fundamental fairness of [his] trial, denying him the federal due process guarantee of a fair trial." According to defendant, "[t]he lurid details of the unrelated cases" drew the jury's attention away from "the real issues in this case," "led to the inaccurate suggestion that Dr. Donaldson always came down on the side of the defense," and

"unfairly shifted the burden to [defendant] to prove he was distinguishable from Johnson, Miller, and Burris."

"[G]enerally, violations of state evidentiary rules do not rise to the level of federal constitutional error. [Citation.]" (*People v. Benavides* (2005) 35 Cal.4th 69, 91, fn. omitted.) Contrary to defendant's suggestion, there was nothing about the erroneous admission of the evidence here that demonstrates infringement of any of his constitutional rights. "Accordingly, the proper standard of review is that announced in *People v. Watson* (1956) 46 Cal.2d 818, 836 . . . , and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711 . . .])." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103.) Under *Watson*, we must consider whether, after an examination of the entire cause it appears reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred. (*Watson,* at p. 836.)

Here, there was no reasonable probability of a more favorable outcome had the court excluded evidence of the other SVPA cases. While the facts of the other SVPA cases were graphic, they were not more graphic than the facts of defendant's offenses. For example, jurors were told that during a nine-month period defendant raped or assaulted 11 woman ranging in age from 14 to 69. During many of these attacks, the women were in their homes, defendant used a knife or other physical force, he continued the attacks in the presence of

children, and he was undeterred even when arrested and released on bail.

Moreover, the other SVPA cases were not a focus of the case against defendant. Rather, the People noted that defendant had stipulated to the existence of the predicate sex offenses, and argued he was diagnosed with paraphilia, substance abuse, and antisocial personality disorder, and his mental disorders made him likely to engage in sexually violent predatory behavior. The People stressed that the jurors and not the psychologists were responsible for deciding whether the People had proved the case against defendant and that defendant's repeated lies proved he was still a risk. Importantly, the People did not mention the facts of the other SVPA cases once in closing argument. In fact, when discussing Dr. Donaldson's alleged bias, the People referred only to the salary he earned from his work on SVPA cases, the special rate he charged Sacramento County for his services, and the small number of cases in which he had found individuals to be SVP's.

Finally, even if it could be argued that Dr. Donaldson's opinion about the other SVPA cases undercut his opinion that defendant was not an SVP, the defense as a whole was not undermined. Dr. Donaldson was not the only witness for the defense, and in fact he was not the only defense expert witness. Consistent with Dr. Donaldson, Dr. Herd also believed defendant was not an SVP based on his opinion defendant did not have a mental disorder as defined by the statute and believed defendant

currently was able to modulate his behavior and responses due to his voluntary participation in AA and NA.

Contrary to defendant's position, there is nothing to suggest that "[t]he effect of discrediting Dr. Donaldson inevitably spilled over into the jury's evaluation of the entire defense case" or that in this case the admission of the evidence "unfairly shifted the burden to [defendant] to prove he was distinguishable from Johnson, Miller, and Burris."

In sum, there was no reasonable probability of a more favorable outcome to defendant had the court excluded evidence of the other SVPA cases.

IV

The Court Did Not Err In Refusing Defendant's Pinpoint Instructions

Defendant contends the trial court erred in refusing four of his pinpoint instructions. Finding these instructions duplicative of the other instructions, we reject defendant's claim.

A

Refused Pinpoint Instruction No. 2

Defendant proffered pinpoint instruction No. 2 as follows: "'Likely to engage in acts of sexual violence' means much more than the mere possibility that the person will reoffend as a result of a predisposing mental disorder that seriously impairs volitional control. There must be substantial danger of new acts of sexual violence arising from the offender's current mental disorder. In order to find that [defendant] is likely to

reoffend you must find that there is a serious and well-founded risk, of reoffense if [defendant] is presently a danger."

The court properly refused pinpoint instruction No. 2 because it duplicated the definition of the term "likely" given in this case. (See *People v. Panah* (2005) 35 Cal.4th 395, 486 [a defendant is not entitled to instructions that merely duplicate a point adequately covered by other instructions]; *People v. Mendoza* (1986) 183 Cal.App.3d 390, 399 [a defendant is not entitled to instructions in his own preferred language rather than that of the standard instructions].) The court instructed the jury, "The word likely as used in this definition means the person presents a substantial danger, that is, a serious and well-founded risk that he will commit sexually violent predatory crimes if free in the community. However, it does not mean that it must be more probable than not that there will be an instance of reoffending."

Defendant argues the court's instruction did not tell the jury "that 'mere possibility of reoffense' falls outside the statute" and that "any substantial danger of reoffense must be based on a finding of a current mental disorder." However, the court's instruction stated that a person is "likely" to reoffend when "the person presents a substantial danger, that is, a serious and well-founded risk that he will commit sexually violent predatory crimes if free in the community." This definition necessarily excludes a finding of likelihood based on the mere possibility of reoffense.

As to defendant's concern that pinpoint instruction No. 2 was necessary to explain that any substantial danger of reoffense must be based on a finding of a current mental disorder, the court also instructed the jury that "you may not find [defendant] to be a sexually violent predator based on prior offenses without relevant evidence of a *currently* diagnosed mental disorder that makes him a danger to the health and safety of others in that it is likely he will engage in sexually violent predatory criminal behavior unless confined within a secure facility." (Italics added.) This instruction clearly addressed defendant's concern that the likelihood of reoffense must be tied to a current mental disorder.

B

Refused Pinpoint Instruction No. 4

Defendant proffered pinpoint instruction No. 4 as follows: "In order to find [] [defendant] to be a sexually violent predator there must be proof that he has serious difficulty in controlling his behavior. This difficulty in controlling behavior, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case."

The court properly refused pinpoint instruction No. 4 because it duplicated the court's other instructions on SVP's.

As stated, the court instructed the jury that "you may not find [defendant] to be a sexually violent predator based on prior offenses without relevant evidence of a currently diagnosed mental disorder that makes him a danger to the health and safety of others in that it is likely he will engage in sexually violent predatory criminal behavior unless confined within a secure facility."

Defendant argues the court's instruction "did not speak to the issue of volitional control" and did not "distinguish[] a sexually violent predator from a criminal recidivist." He is wrong. The court's instruction told the jury it could not find defendant to be an SVP based on prior offenses without a currently diagnosed mental disorder that made it likely he will engage in sexually violent predatory criminal behavior. The court defined "diagnosed mental disorder" as "includ[ing] a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." These instructions made clear that criminal recidivism by itself was insufficient for an SVPA finding and that lack of volitional or emotional control was a component of a diagnosed mental disorder. The court therefore properly refused defendant's pinpoint instruction No. 4.

C

Refused Pinpoint Instruction No. 5

Defendant proffered pinpoint instruction No. 5 as follows: "To find the petition true in this case, you must find that [defendant] has a currently diagnosed mental disorder that makes him presently dangerous. The mere possibility that a person may become dangerous at some unspecified time in the future is not sufficient to sustain the petition." Defendant contends the instruction was necessary because the other instructions "did not tell the jury that [defendant] had to be 'presently dangerous'" and "did not define 'likely' as limited to present time."

The court properly refused pinpoint instruction No. 5 because it duplicated the court's other instructions on SVP's. The court instructed the jury that "[t]he term sexually violent predator means a person who . . . *has* a diagnosed mental disorder" that "*makes* him a danger to the health and safety of others in that it *is* likely he will engage in sexually violent predatory criminal behavior." (Italics added.) Contrary to defendant's claim that use of the present tense was a "somewhat oblique and overly academic method" of conveying these principles, use of the present tense, a concept taught in grammar school, was sufficient to convey the statutory requirements. (See *Hubbart v. Superior Court*, *supra*, 19 Cal.4th at p. 1162 [the statute's use of the present tense "clearly requires the trier of fact to find that an SVP is dangerous at the time of commitment].)

D

Refused Pinpoint Instruction No. 6

Defendant proffered pinpoint instruction No. 6 as follows: "The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. Where an expert bases his conclusion upon assumptions which are not supported by the record, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value."

The court properly refused pinpoint instruction No. 6 because it duplicated the court's other instructions on expert witness testimony. The court instructed the jury that "[y]ou must consider the [experts'] opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide." It then instructed the jury to "consider the expert's knowledge, skill, experience, training, and education, and the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion." Finally, and most importantly, the court instructed the jury that "[y]ou must decide whether the information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence." Despite defendant's argument to the contrary, the given instructions on expert witness testimony were sufficient to convey the principles covered by defendant's pinpoint instruction.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

I concur:

BUTZ, J.

Concurrin opinion of Scotland, P.J.

Did the prosecutor go too far in showing that a defense expert's opinion testimony that defendant is not a sexually violent predator was based not on principle, but on profit? The majority conclude the trial court erred in failing to rein in the prosecutor. I disagree.

Dr. Theodore Donaldson, a clinical psychologist, testified as an expert for the defense and opined there was insufficient evidence that defendant had a diagnosed mental disorder which makes him likely to engage in sexually violent criminal behavior. Donaldson so opined despite defendant's history of committing numerous violent sex offenses against adult woman and young girls.

The prosecutor was permitted to cross-examine Dr. Donaldson about his apparent bias in favor of defendants in Sexually Violent Predator Act (SVPA) cases. Among other things, the court allowed the prosecutor to raise specific facts underlying Donaldson's expert opinions in favor of defendants in three other SVPA cases. The majority find fault in this latter ruling. In their view, "the facts of the three other SVPA cases and the psychologist's opinion in those cases were not relevant to show his bias or prejudice . . . ." To the contrary, the cross-examination was probative and proper.

The majority have no quarrel with the cross-examination that elicited that Dr. Donaldson was a well-paid expert (earning about $180,000 in one year for his testimony in SVPA cases), who routinely reached opinions favorable to defendants in such cases (disagreeing 90 percent of the time with the state's experts in the 254 SVPA cases in which he has testified), and who was defense counsel's

friend. As the majority readily acknowledge, this evidence "was relevant because a rational inference can be drawn that the more defendants for whom Dr. Donaldson testifies, the more he is not giving his true opinion in these cases, or that his analysis is not as trustworthy as it might be. As a matter of common sense, the fact that a well-paid expert witness routinely offers opinions in favor of SVP defendants in a great number of cases has some tendency in reason to prove he is not being entirely objective in formulating his opinion." Stated simply, the evidence was relevant to show that Donaldson is biased in favor of defendants in SVPA cases because he can profit by being a hired gun for the defense in those cases.

The problem, as the majority see it, is that the facts of other cases in which Dr. Donaldson has testified for SVPA defendants were not relevant to his bias unless "the jury had some other basis for concluding that the given facts reasonably should have led to a different opinion." That other basis, the majority say, could come only in the form of contrary expert opinion about those other cases, which was not introduced here. I am not persuaded.

The repetitive nature of defendant's sex crimes was very much like the repetitive nature of the sex crimes committed in the three other SVPA cases.

Over a period of time, defendant (1) awoke a 14-year-old girl in her home, forced her into the backyard, told her he wanted to "lay her," and threatened to kill her if she screamed, (2) entered the home of a 69-year-old woman at night and raped her, (3) chocked a sleeping 16-year-old girl and raped her while her 13-year-old

sister was in the house, (4) raped a 23-year-old woman at knifepoint while her baby was in bed with her and threatened to kill them both if the woman reported the rape, (5) raped a 39-year-old woman while her children were in the next room, (6) raped a 54-year-old woman at knifepoint in her home, became angry when he could not ejaculate, threatened to shoot her, forced her to orally copulate him, and then threatened to place a knife in her vagina and sodomize her if she did not cooperate, (7) raped a 38-year-old woman while her children were in the house, and made one of her children undress and lie on the floor, (8) entered the home of a 29-year-old woman and--before running away when confronted by the woman's son--told her that he had a knife and "want[ed] her," (9) raped a 23-year-old woman at knifepoint in her house, (10) threatened a 44-year-old woman at knifepoint, told her he had killed four others so she better do what he wanted, and tried repeatedly to rape her, (11) entered the home of a 54-year-old woman, hit her on the head, told her to play with his penis so he could get an erection, then raped her and threatened to kill her, (12) masturbated in front of a female staff member at Atascadero State Hospital, and threatened to kill another female staff member, after he was incarcerated there, (13) implied to a social worker that he had committed more rapes than those for which he was caught, (14) twice masturbated in front of female correctional officers after he was transferred to a prison facility, (15) told doctors that "something uncontrollable led him to sexually reoffend" and that he would have eventually killed someone if he had not been caught, and (16) exposed himself to female staff and

made abusive comments to them after he was again committed to Atascadero State Hospital.

Despite defendant's history of numerous violent sex offenses, Dr. Donaldson opined there was insufficient evidence to establish that defendant had a mental disorder making it likely he would continue to commit such offenses if he were released from custody. Donaldson explained, the "thing that makes it a mental disorder is that the person is driven to something they [*sic*] don't want to do, and they [*sic*] feel bad about it and it's cycling, because of the cycling of the urges with the guilt and so forth." Because he saw no evidence of such "cycling," Donaldson opined that defendant's behavior was not evidence of a mental disorder; rather, "[w]hat you have evidence of is criminal behavior." As for defendants' conduct and comments after being placed in custody, Donaldson testified that although "[w]e make a lot out of sexual innuendos," defendant's remarks and conduct simply reflected anger or, perhaps, misguided "humor."

The conduct of the defendants in the three other SVPA cases, and Dr. Donaldson's opinion testimony in those cases, were as follows:

A person (1) molested an 11-year-old boy and was committed to a mental hospital as a "sexual psychopath," (2) molested a 12-year-old boy after being released from the mental hospital, (3) attempted to sodomize another 12-year-old boy, (4) abducted a boy and sodomized him in the basement of a church, (5) sodomized another boy and was committed to prison, (6) sodomized and orally copulated a 16-year-old developmentally disabled boy after being released from prison,

and was again incarcerated, and (7) sodomized and orally copulated a 15-year-old boy after being released from incarceration. Opining that the person did not have a mental disorder which resulted in his sex crimes, Dr. Donaldson explained there was insufficient evidence that the person had been unable to control his sexually dangerous behavior; rather, in Donaldson's view, the person simply "'chooses to do whatever he wants to do.'"

Another person admitted molesting 20 to 25 boys over a period of 20 years. Opining there was insufficient evidence that the person was a pedophile or had some other mental disorder which resulted in the sex crimes, Dr. Donaldson explained that the conduct simply "indicated" "criminal behavior and . . . doesn't identify mental disorder."

The third person (1) raped a woman, while armed with a screwdriver, when she was at home with her 16-month-old daughter, (2) attempted to rape another woman while armed with a screwdriver, (3) attacked a woman in a parking lot with a knife and raped her, for which he was committed to prison, and (4) lured a 7-year-old girl into his house and raped her after he was released from prison. Dr. Donaldson opined that the person did not have a mental disorder which resulted in the sex crimes. Thus, the prosecutor inquired, "no amount of criminal activity creates a mental disorder?" and "[d]oesn't matter whether it was one sex offense or a thousand sex offenses, that by itself does not create a mental disorder . . . ?" Donaldson replied, "That's correct . . . ."

Under the circumstances of this case, the relevancy of the aforesaid cross-examination was not dependent upon there being

other expert testimony contradicting Dr. Donaldson's opinions about the defendants in the three other SVPA cases.

First, the prosecutor presented expert opinion testimony in this case discrediting Dr. Donaldson's theory that repeated acts of violent sexual misconduct are insufficient to establish that a person has a mental disorder making the person a danger to the health and safety of others in that the person is likely to engage in sexually violent behavior. Therefore, the jurors had a basis, founded upon the expert testimony in this case, to conclude that Dr. Donaldson's opinions in the other three cases were meritless and demonstrated his bias to profit by testifying as a defense expert in SVPA cases. Stated another way, because Dr. Donaldson's theory in the other cases was the same as his theory in this case, it was unnecessary to introduce contrary expert opinion regarding the persons in the other cases.

Second, criminal conduct can be circumstantial evidence that the person has a mental disorder that causes the behavior. The fact that normal people do not forcibly rape adult women and young girls or forcibly sodomize and orally copulate young boys is not so beyond the understanding of lay persons to preclude jurors from considering the facts of the prior cases, along with the contrary expert opinion in this case, to resolve whether Dr. Donaldson is biased in favor of sexually violent predators in order to profit from the giving of his expert opinion in such cases.

Third, the facts of the three prior cases were relevant to put into perspective Dr. Donaldson's opinions in those cases and, thus, to assist the jurors in assessing the prosecutor's argument that

Donaldson’s opinions were illogical and motivated not by principle, but by personal profit.

Accordingly, in my view, the trial court correctly permitted the prosecutor to pursue this line of cross-examination.

In all other respects, I concur in the majority’s analysis and in the affirmance of the judgment.

SCOTLAND, P.J.